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No. 10-110

In The
Supreme Court of the United States

JAMES BEN BROWNFIELD,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

PETITIONER'S REPLY BRIEF IN SUPPORT OF HIS PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

This Court's intervention is necessary to resolve a split in capital cases that has developed among state supreme courts in the wake of *Ring v. Arizona*, 536 U.S. 584 (2002), and *Blakely v. Washington*, 542 U.S. 296 (2004). Consistent with *Ring* and *Blakely*, several state supreme courts have correctly concluded that the Sixth Amendment requires a jury determination of aggravating facts that expose a defendant to a death sentence. Justices of this Court have suggested the same interpretation. *See Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) (Scalia, J., joined by Thomas, J. and Rehnquist, C.J., stating that, under *Ring*, "the Sixth Amendment requires that a jury, and not a judge, find the existence of *any aggravating circumstances*, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt" (emphasis added)). Yet the supreme courts of Alabama and other states have erroneously held that the Sixth Amendment permits a sentencing judge to find an aggravating fact necessary to impose the death penalty, provided that the jury finds a single aggravating fact (which may be insufficient, on its own, to make a capital sentence available). In Mr. Brownfield's case, the sentencing judge found an aggravating fact, which she then used to determine that Mr. Brownfield could be exposed to the maximum punishment of – and deserved – death.

This Petition presents an ideal opportunity for the Court to address a significant constitutional error in capital cases. First, this is a direct appeal, and Mr.

Brownfield has properly preserved the issue. Second, the violation of Mr. Brownfield's Sixth-Amendment right was not harmless. The judge-found aggravating fact was central to Mr. Brownfield's exposure to the maximum sentence of death. In addition, it is futile to speculate what an Alabama jury might have done in the absence of constitutional error because (1) Alabama lacks any procedure for enabling juries to make binding, factual determinations during the sentencing phase of a capital case, and (2) even if Alabama had such a procedure, the advisory jury's determination in this case would have been ineffectual under Alabama law to sentence Mr. Brownfield because that determination was not unanimous.

The Court should grant certiorari in order to prevent sentencing judges in capital cases from imposing maximum sentences that the jury's factual findings, standing alone, do not allow.

I. CERTIORARI IS APPROPRIATE TO RESOLVE A SPLIT AMONG THE STATE SUPREME COURTS REGARDING WHETHER JUDGE-FOUND FACTS CAN, CONSISTENT WITH THE SIXTH AMENDMENT, INCREASE LEGISLATIVELY PRESCRIBED MAXIMUM SENTENCES FROM LIFE IN PRISON TO DEATH.

Certiorari is appropriate because state supreme courts are applying conflicting standards regarding whether a defendant may, consistent with the Sixth Amendment, be exposed to a maximum punishment

of death based upon aggravating facts found only by a judge. *See* U.S. SUP. CT. R. 10 (listing as possible basis for grant of certiorari that "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort"). Neither the existence nor the significance of this split of authority is contested by Respondent.

On one side of the divide stand supreme courts in Colorado, Indiana, and Nebraska, which have correctly held that this Court's decisions in *Ring* and *Blakely* require a jury to find all aggravating facts used by a judge in imposing the death penalty. *See, e.g.*, *People v. Montour*, 157 P.3d 489, 497 (Colo. 2007) ("Because a defendant is not eligible for the death penalty until all aggravating factors are weighed against all mitigating factors, the presence of one *Blakely*-exempt aggravating factor standing alone does not make a capital defendant eligible for the death penalty. . . . Capital defendants have a right to a jury trial on all aggravating facts used to determine death eligibility."); *Ritchie v. State*, 809 N.E.2d 258, 265 (Ind. 2004) ("The Supreme Court has now made clear that statutory aggravators in Indiana's Death Penalty law are the functional equivalent of elements of a crime, and must be found by a jury beyond a reasonable doubt."); *State v. Gales*, 658 N.W.2d 604, 624 (Neb. 2003) ("*Ring v. Arizona* therefore requires that in order to fulfill the guarantee of rights conferred by the Sixth Amendment, the existence of any aggravating circumstance utilized in the imposition of

[the defendant's] sentence of death, other than a prior criminal conviction, must be determined by a jury." (internal citation omitted)).

On the other side of the divide stand supreme courts in Alabama, Florida, and Delaware, which have held that this Court's decisions in *Ring* and *Blakely* allow a judge to increase a sentence from life in prison to death based upon aggravating facts not found by the jury. *See, e.g., Ex parte Hodges*, 856 So.2d 936, 944 (Ala. 2003) (holding that jury's finding of one aggravating fact during innocence/guilt phase of trial was sufficient to satisfy Sixth Amendment, regardless of whether sentencing judge considered other aggravating facts not found by the jury); *Brice v. State*, 815 A.2d 314, 321 (Del. 2003) (accepting State's argument that *Ring* "merely requires the jury to find the existence of one statutory aggravating factor before the judge may consider all aggravating" facts); *Duest v. State*, 855 So.2d 33, 49 (Fla. 2003) (rejecting Sixth-Amendment argument under *Ring* where judge, after recognizing defendant's prior violent felony aggravator conviction, proceeded to find two important aggravating facts that were weighed in calculus of death).

This sharp split of authority among the states' highest courts cannot be resolved without this Court's intervention. The Court should therefore grant this Petition in order to correct the constitutional analysis of those jurisdictions that, contrary to this Court's holdings in *Ring* and *Blakely*, permit judge-found

facts to increase legislatively prescribed maximum sentences in capital cases.[1]

II. THIS CASE PRESENTS A COMPELLING OPPORTUNITY TO CONSIDER THE QUESTION PRESENTED

At least two aspects of this case make it ideal to address the fundamental Sixth-Amendment issue raised in this Petition.

First, the case is on direct review, and Mr. Brownfield properly preserved the question raised in this Petition by presenting it to the Alabama courts. Before both the Alabama Court of Criminal Appeals and the Alabama Supreme Court, Mr. Brownfield argued that the trial judge's imposition of the death penalty based upon judge-found facts violated the Sixth Amendment in light of this Court's holding in *Ring*. App. 107a-108a, 111a-119a. Mr. Brownfield can therefore raise any argument in support of that claim before this Court. *See Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) ("Having raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of

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[1] Respondent argues that the denial of certiorari by this Court with respect to allegedly "similar claims" in prior, unrelated cases warrants denial in this case. Respondent's Br. at 14. But "'[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.'" *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923)).

that claim here."). Moreover, the Alabama Court of Criminal Appeals rejected the specific argument raised in this Petition. It held that "the limited mandates of *Ring* have been satisfied in this case, because the jury unanimously found at least one statutory aggravating circumstance, making Brownfield eligible for the death penalty." App. 92a-93a. Although the Alabama Supreme Court subsequently declined to address Mr. Brownfield's argument, its decision does not undermine Mr. Brownfield's preservation of the issue. *See United States v. Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule . . . precludes a grant of certiorari only when the question presented was not pressed or passed upon below. . . . [T]his rule operates (as it is phrased) in the disjunctive. . . ." (internal quotation marks omitted)).

Second, the violation of Mr. Brownfield's Sixth-Amendment right was not harmless. The judge-found aggravating fact played a central role in the imposition of the death penalty. *See* App. 149a-153a. It is pure speculation to suggest that Mr. Brownfield would have been sentenced to death in the absence of this judge-found fact. To the contrary, the jury's inability to reach a unanimous recommendation regarding Mr. Brownfield's sentence emphasizes the importance of each fact in the sentencing calculus.

In addition, the constitutional error was not harmless because (as Respondent does not contest) Alabama lacks a procedural mechanism for obtaining binding, jury-determined facts during the sentencing phase. *See Washington v. Recuenco*, 548 U.S. 212, 218

(2006) ("If . . . Washington law does not provide for a procedure by which [the] jury could have made a finding pertaining to [the sentencing factor], that . . . suggests that respondent will be able to demonstrate that the *Blakely* violation *in* [the] *particular case* was not harmless."). Alabama imposes numerous obstacles that prevent a jury's factual determinations at sentencing. First, as Respondent explains, in Alabama "the jury is not required to specify which aggravating circumstance(s) or mitigating circumstance(s) it found to exist." Respondent's Br. at 4 n.1. Second, even assuming that the jury in Mr. Brownfield's case had made specific findings of aggravating facts during the sentencing phase, its findings would not have been binding on the final arbiter of Mr. Brownfield's sentence – the judge. *See* Respondent's Br. at 5-6. *See also* ALA. CODE § 13A-5-47(e) ("In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist. . . . While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court."); *Ex parte Waldrop*, 859 So.2d 1181, 1193 (Ala. 2002) (affirming court's imposition of death sentence over jury's recommendation of life). Finally, even assuming (contrary to Alabama law) that the jury's sentencing recommendation had been binding, this recommendation would have been insufficient to impose the death penalty upon Mr. Brownfield because the jury was unable to reach a unanimous verdict, as is required under Alabama law for an operative jury verdict in a criminal case. *See*

ALA. R. CRIM. P. 23.1(a) ("The verdict of the jury shall be unanimous. . . .").

The Court should therefore grant this Petition, which raises a significant constitutional issue that has been properly preserved and whose violation was not harmless in this case.

III. ALABAMA LAW CONTRAVENES THIS COURT'S PRECEDENTS AND MUST BE CORRECTED TO AVOID FURTHER CONSTITUTIONAL ERRORS IN CAPITAL CASES.

This Court has made clear that a jury must find those facts that are necessary and sufficient to expose a defendant to a maximum sentence. *See Blakely*, 542 U.S. at 303-04 ("[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority."); *Sattazahn*, 537 U.S. at 111 (Scalia, J., joined by Thomas, J. and Rehnquist, C.J., stating that, under *Ring*, "the Sixth Amendment requires that a jury, and not a judge, find the existence of *any aggravating circumstances*, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt" (emphasis added)); *Ring*, 536 U.S. at 589

("Capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."). Under Alabama law, a jury's finding of a sole aggravating fact is a necessary, but not sufficient, condition to expose a defendant to a capital sentence. In order for the death penalty to be available as a sentencing option, the aggravating fact(s) found by the judge must outweigh any mitigating circumstances.[2] Where, as in Mr. Brownfield's case, a judge relies upon an aggravating fact that was not found by the jury in order to increase a defendant's sentence from life in prison to death, the judge inflicts punishment that the jury's verdict does not allow, in violation of the Sixth Amendment.[3]

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[2] *See* ALA. CODE § 13A-5-45(f) ("Unless at least one aggravating circumstance as defined in Section 13A-5-49 exists, the sentence shall be life imprisonment without parole."); *Ex parte Waldrop*, 859 So.2d at 1191 (stating that a trial court "may opt to impose the death penalty" only after the finding of aggravating fact(s) that outweigh(s) mitigating circumstances); *Ex parte Woodard*, 631 So.2d 1065, 1071 (Ala. Crim. App. 1993) ("A greater punishment – death – may be imposed on a defendant convicted of a capital offense, but only if one or more of the aggravating circumstances enumerated in § 13A-5-49 is found to exist and that aggravating circumstance(s) outweighs any mitigating circumstance(s) that may exist." (citing ALA. CODE §§ 13A-5-45(f), 13A-5-46(e), 13A-5-47(e) (emphases in original))).

[3] This Petition does not question that, once a jury has found facts legally essential to expose a defendant to a statutory sentencing range, then the sentencing judge may consider additional factors in determining what sentence to impose, so long as the sentence falls within the established range.

Contrary to this precedent and reasoning, Alabama uses an erroneous conception of a defendant's "maximum sentence," which is allegedly reached in capital cases when a jury finds any factual prerequisite in favor of death, regardless of whether that fact is sufficient to outweigh mitigating circumstances. Respondent asserts that it is "constitutionally irrelevant" that "[t]he judge and jury may ultimately find different aggravating and mitigating circumstances to exist" and that "once the jury finds an aggravating circumstance . . . the trial judge may make any additional finding . . . without running afoul of *Ring*." Respondent's Br. at 18. That argument is consistent with the decision of the Alabama Court of Criminal Appeals in Mr. Brownfield's case and with precedent of the Alabama Supreme Court. *See* App. 92a-93a ("[T]he limited mandates of *Ring* have been satisfied in this case, because the jury unanimously found at least one statutory aggravating circumstance, making Brownfield eligible for the death penalty."); *Ex parte Waldrop*, 859 So. 2d at 1190. But "*Apprendi* . . . ensur[es] that the judge's authority to sentence derives wholly from the jury's verdict." *Blakely*, 542 U.S. at 306. In giving the judge *carte blanche* to find any facts necessary to impose the death penalty once the jury has engaged in some fact-finding (regardless of the relevance of the jury's fact-finding in determining the maximum sentence to which the defendant is exposed), Respondent and Alabama's courts have reduced the jury to an ornamental accessory that is excluded from determining the factual basis of a capital defendant's maximum sentence. Alabama's

interpretation of the Sixth Amendment undermines the right to a jury trial by guaranteeing jury fact-finding on issues potentially inconsequential to the maximum sentence, while preserving the judge's authority to find facts that expose and condemn a defendant to death. *See Ring*, 536 U.S. at 609 ("The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death.").

CONCLUSION

For the foregoing reasons, petitioner prays that this Court grant certiorari to the Alabama Supreme Court and declare his rights were violated.

Respectfully submitted,

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